85-2024

Supreme Court, U.S.
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No. 85-.....

# In the Supreme Court

OF THE

# United States

October Term, 1985

HARRY H. BAIE, JR.,
*Petitioner,*
VS.
THE SECRETARY OF DEFENSE OF
THE UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDISON P. McDANIELS
Attorney at Law
1566 North D Street
San Bernardino, California 94205
Phone: 714-885-3477
*Attorney for Petitioner*

Bowne of Los Angeles, Inc., Law Printer (213) 742-6600

BHP

## QUESTIONS PRESENTED FOR REVIEW

1. May a veteran with a service connected disability, not on active military duty, who has complied with Title 10 U.S.C. Section 1074(b) and obtained an operation pursuant to a non availability certificate under that section, bring a suit against the United States where the Secretary denies payment of an implant on the basis that the implant is not a prosthetic device within the meaning of Title 10 Section 1077(b)(2).

2. Where a veteran with a service connected disability is not on active military duty and has complied with Title 10 U.S.C. Section 1074(b) and obtained an operation pursuant to a non-availability certificate under that section, does the Secretary of Defense have the discretionary duty to deny payment of the operation on the basis that his penile implant is not a prosthetic device within the meaning of Title 10 Section 1077(b)(2) which governs medical care for dependents.

## LIST OF ALL PARTIES; LIST OF RELATED COMPANIES

The parties necessary to a resolution of this case are HARRY R. BAIE, JR., the petitioner; THE SECRETARY OF DEFENSE OF THE UNITED STATES OF AMERICA, the respondent; the United States District Court for the Central District of California; Robert C. Bonner, United States Attorney, Frederick M. Brosio, Jr., Assistant United States Attorney, Chief Civil Division, and Stephen E. O'Neil, Assistant United States Attorney, 1100 United States Courthouse, 312 North Spring Street, Los Angeles, California, 90012; the Attorney General of the United States; and Edison P. McDaniels, Attorney for the petitioner, 1566 North D Street, San Bernardino, California 92405.

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HARRY H. BAIE, JR.,
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THE SECRETARY OF DEFENSE OF
THE UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## I

## CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported and appears in the appendix hereto marked Appendix A.

An Order was rendered by the United States District Court for the Central District of California based upon a findings of fact and conclusions of law filed contemporaneously therewith.

The Order and the findings of fact and conclusions of law rendered by the District Court appears in the appendix hereto marked Appendix B.

## II

## STATEMENT OF JURISDICTIONAL GROUNDS

The entry of the opinion of the United States Court of Appeals for the Ninth Circuit was filed on March 17, 1986.

Review here is sought pursuant to Title 28 U.S.C. Section 2101(c) which provides for review applied for within 90 days after the entry of such judgment or decree and further jurisdiction is provided pursuant to Title 28 United States Code, Section 1254.1.

It is believed that Title 28 U.S.C. Section 2101(c) and Title 28 U.S.C. Section 1254.1 confer on this Court the jurisdiction to review the judgment or decree in question by writ of certiorari.

## III

## CONSTITUTIONAL PROVISIONS AND STATUTES

This action arises out of and pursuant to the following sections:

Title 10 U.S.C. Section 1074(b), Appendix C herein;

Title 10 U.S.C. Section 1077(b), Appendix D herein;

Title 10 U.S.C. Section 1077(b)(2), Appendix D herein;

Title 28 U.S.C. Section 1346(b), Appendix E herein;

Title 28 U.S.C. Sections 2671-2680 [The Tort Claims Procedure], Section 2680 is included as Appendix F herein.

## IV

## STATEMENT OF THE CASE

Petitioner is a retired Master Sergeant of the United States Marine Corps, having been transferred to the permanent disability retirement list of the Department of the Navy on March 21, 1957.

The nature of his disability was diabetes mellitus and neuropathy, n.e.c., trigeminal nerve, right, post surgical.

Prior to suffering this disability, petitioner had served in the Armed Services from October 23, 1935, to date of retirement, April 1, 1957, and was a veteran of both World War II and Korea.

His disability was service connected.

Petitioner alleged that he was suffering and did suffer as a result of his diabetic condition, that he had one lower extremity amputated below the knee, lost the use of some facial muscles, and was impotent.

In an attempt to cure the impotence, petitioner petitioned at a direct care military facility for treatment and the treating physician at a direct care military facility recommended a penile implant.

Petitioner alleged in the complaint below that a direct care military facility which could have implanted the penile implant was not available and he was thereafter provided with a non-availability statement and proceeded to have the implant performed at a non-military facility.

He alleged that he was led to believe that Ochampus would be responsible for the payment of a small carrion implant procedure and surgery.

He had the surgery. He had the implant and then after he had the surgery and the implant, the Secretary made the decision that it was not a necessary medical proce-

dure and denied the payment for the implant which thereafter caused Mr. Baie to become impotent again, and hence he brought suit under the Tort Claims Act.

At the time Mr. Baie had the implant he was not under any military duty. He was not in the military service, and he was in fact a full fledged veteran who had earned every veteran's right and pension that he was entitled to.

In addition the special administrative officer or hearing officer who heard the initial hearing, ruled that the implant was a necessary medical procedure on behalf of the petitioner and ruled that it should be paid.

This brings up the issues as presented in this case.

## V

## ARGUMENT

There does not seem to be any dispute as to the facts in this case.

The dispute is as to whether or not the petitioner may sue the government under the Tort Claims Act for the failure of the Department of Defense to pay for the penile implant which caused him such terrible emotional distress.

Petitioner's argument of course is that the Secretary had no discretionary duty other than to pay the charges for the penile implant. Where he had obtained a certificate of non-availability and had obtained an operation under that certificate there was nothing left to do but pay the bill.

Petitioner claims that under 10 U.S.C. Section 1074(b) and as a former member of the uniformed services, he was entitled to the rendition of the medical services.

Petitioner maintains that the only limitation contained in Title 10 Section 1074(b) to a former uniformed member, is the availability of space and the capability of the medical and dental staff.

Petitioner feels that this case falls within *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141, in which the Court upheld the claim under the Tort Claims Act made by a discharged veteran for damages for negligence in the treatment of his knee in a veteran's hospital.

Just as in *Brown, supra*, the petitioner in this case damages occurred after his discharge, while he enjoyed civilian status and he was neither on active duty or subject to military discipline.

The petitioner further feels that this case falls under *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918 (1949).

In *Brooks v. United States*, the Court allowed a suit under the Tort Claims Act.

Respondent of course feels that this case should follow the line of cases following the Feres Doctrine.

However, petitioner feels that since *United States v. Brown* was reaffirmed in *Block v. Neal*, 103 S.Ct. 1089, note no. 4, pages 1092, 1093, he stands in the same relationship as do *Brown* and *Block*.

Furthermore, petitioner feels that Title 10 U.S.C. Section 1074(b) does not delegate to the Secretary the authority to deny prosthetics to retired members of the Armed Forces and that when he uses such discretion to deny prosthetics to retired members of the Armed Forces, he is therefore acting beyond his Constitutional duty and then if he is outside of his delegated duty then he could not have been acting within the discretionary exception of Title 28 U.S.C. Section 2680(a).

Petitioner's contention is that he belongs on the *Brown* side of cases where tort actions should be allowed against the government for its negligence and failure herein to pay for the penile implant which has caused him severe emotional harm, and thus he should be permitted to sue the government rather than the Feres Doctrine and he requests certiorari on that basis.

Petitioner further requests that this Court grant to him an award of attorney fees pursuant to Title 28 U.S.C. Section 2678.

## VI

## CONCLUSION

As we said in the brief before the Ninth Circuit, the Federal Tort Claims Act permits suits against the United States for the "negligence or wrongful act done" of a government employee. [*Shearer v. United States,* 723 F.2d 1102, 1105.]

Petitioner believes the facts in this case do not grant discretion to the Secretary to deny the medical care provided nor discretion to refuse to pay for that care.

Based upon *Brooks v. United States,* 337 U.S. 49, 69 S.Ct. 918, and *United States v. Brown,* 348 U.S. 110, 75 S.Ct. 141, we urge the Court to reverse and remand to the District Court for further proceedings.

Respectfully submitted,

EDISON P. MCDANIELS
*Attorney for Petitioner*

# APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRY H. BAIE, JR.,
*Plaintiff-Appellant,*

v.

THE SECRETARY OF DEFENSE OF
THE UNITED STATES OF AMERICA
*Defendant-Appellee.*

## OPINION

Appeal from the United States District Court
for the Central District of California
Honorable Cynthia H. Hall, Judge Presiding
No. 84-5823
D.C. No. CV 83-5418-CHH

Argued and Submitted May 7, 1985
Pasadena, California

Before: WRIGHT, ALARCON, and NORRIS, Circuit Judges:
NORRIS, Circuit Judge:
Received: March 19, 1986 Filed: March 17, 1986
Cathy A. Catterson, Clerk

Appellant Harry Baie, a retired member of the United States Marine Corps, claims that he is entitled to reimbursement under the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), 10 U.S.C. §§ 1071-1089 (1982), for the cost of small-carrion penile

implant surgery. Baie applied for reimbursement under CHAMPUS after undergoing the surgery in a non-military hospital. CHAMPUS officials denied Baie's application on the ground that the procedure failed to qualify for benefits under the applicable law and regulations governing CHAMPUS.

On appeal, the Office of CHAMPUS Reconsideration upheld the denial of benefits. The Office determined that the surgery was not medically necessary; that the penile implant procedure did not constitute treatment of a medical or surgical condition; that the penile prosthesis was a specifically excluded prosthetic device; and that under the Department of Defense Appropriations Act of 1977, therapy or counseling for sexual dysfunctions or inadequacies was specifically excluded as a CHAMPUS program benefit.

Following a subsequent hearing, an independent hearing officer recommended that the penile implant be approved as a CHAMPUS benefit. The Assistant Secretary of Defense (Health Affairs) then issued the agency's final decision that the penile implant was a prosthetic device specifically excluded from benefits under the statutes and regulations establishing the CHAMPUS program.[1]

---

[1]This ruling was primarily based on 10 U.S.C. 1077(b), which provides in pertinent part as follows:

> The following types of health care may not be provided under section 1076 of this title:
>
> . . .
>
> (2) Prosthetic devices, hearing aids, orthopedic footware, and spectacles except that —
>
> (A) outside the United States and at stations inside the United States where adequate civilian facilities are unvailable, such items may be sold to dependents at cost to the United States, and

After the Assistant Secretary's final decision, Baie filed this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b) (1982), seeking damages in the amount of the cost of the surgery. The district court granted summary judgment for the Secretary on the ground that Baie's action is barred by the discretionary function exception to the waiver of sovereign immunity contained in the FTCA.[2] We affirm.

We review a grant of summary judgment *de novo*. *Mardirosian v. Lincoln Nat'l Life Ins. Co.* 739 F.2d 474, 477 (9th Cir. 1984); *Lojek v. Thomas,* 716 F.2d 675, 677 (9th Cir. 1983). In this case the relevant facts are not in dispute; the only question presented on appeal is one of law — whether the Secretary of Defense's administrative decision that a penile implant is a prosthetic device that does not qualify for benefits under CHAMPUS falls within the discretionary function exception of the FTCA.[3]

We believe the district court accurately characterized Baie's action as follows:

> The gravamen of plaintiff's claim is that the Assistant Secretary of Defense (Health Affairs) abused

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(B) artificial limbs and artificial eyes may be provided.

[2]The discretionary function exception provides that the Act shall not apply to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a)(1982).

[3]We note that Baie may not bring suit against the Secretary of Defense under the Federal Tort Claims Act. "Only claims 'against the United States' are included within the the Federal Tort Claims Act jurisdiction." *Myers & Myers, Inc. v. United States Postal Service,* 527 F.2d 1252, 1256 (2d Cir. 1975)(citing 28 U.S.C. § 1346(b)(1982)).

> his discretion, or acted contrary to law, in denying plaintiff's claim for reimbursement of medical expenses. The Assistant Secretary's decision required interpretation of the statutes, *e.g.*, 10 U.S.C. § 1977(b)(2), and regulations governing the medical benefits available to retired military personnel.

Conclusions of Law 3, No. CV-83-5418 (C.D. Cal. April 3, 1984).

We also agree with the district court that whether the Assistant Secretary's adminstrative interpretation of CHAMPUS excluding penile implants from the statute as "prosethic devices" was arbitrary or contrary to law may not be tested in an action under the FTCA. The legislative history of the FTCA makes it clear that Congress did not intend that "the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort." H.R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945); *see also* Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary, 77th Cong., 2d Sess., 28, 33 (1942) (statement of Assistant Attorney General Francis Shea). The Assistant Secretary's interpretation of the statute is a plainly discretionary administrative act the "nature and quality" of which Congress intended to shield from liability under the FTCA. *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 104 S. Ct. 2755, 2765 (1984). As the Supreme Court said recently in *Varig,* the discretionary function exception was designed to prevent "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic,

and political policy through the medium of an action in tort." *Id.* at 2765.[4]

**AFFIRMED.**

---

[4]We express no opinion as to whether Baie could have obtained judicial review of the Assistant Secretary's decision under the Administrative Procedures Act (5 U.S.C. §§ 551-706 (1982)), or any other statutory provision.

## APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF AMERICA

---

HARRY H. BAIE, JR.,
*Plaintiff,*

v.

THE SECRETARY OF DEFENSE OF
THE UNITED STATES OF AMERICA,
*Defendant.*

---

Order
No. CV 83-5418-CHH(JRx)

Received: April 11, 1984 Entered: April 5, 1984
Filed: April 3, 1984

UPON CONSIDERATION of the defendants Motion to Dismiss or, in the alternative, for Summary Judgment, plaintiff's opposition thereto, and of the entire record before the Court, it is this 3rd day of April, 1984 hereby

ORDERED, ADJUDGED AND DECREED that the defendant's Motion be, and is hereby granted; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that this action is dismissed as against the defendant with prejudice.

CYNTHIA HOLCOMB HALL
United States District Judge

Presented By:

ROBERT C. BONNER
United States Attorney

FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

STEPHEN E. O'NEIL
Assistant United States Attorney

*Attorneys for Defendant*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HARRY H. BAIE, JR.,
*Plaintiff,*
v.
THE SECRETARY OF DEFENSE OF
THE UNITED STATES OF AMERICA,
*Defendant.*
No. CV 83-5418-CHH

# FINDINGS OF FACT AND CONCLUSIONS OF LAW

Received: April 11, 1984 Filed: April 3, 1984

This matter is before the Court on defendant's motion to dismiss or, in the alternative, for summary judgment. The Court has considered the points and authorities submitted by the parties, the attached materials, and the oral argument of counsel. The Court makes the following Findings of Fact and Conclusions of Law in support of the entry of summary judgment in favor of defendant this date.

## FINDINGS OF FACT

1. Plaintiff, Harry H. Baie, Jr. is a retired enlisted member of the United States Marine Corps who was medically discharged from active duty military service on March 21, 1957. On April 1, 1957, the plaintiff was placed on permanent disability retirement based on a diagnosis of diabetes mellitus and neuropathy.

2. As a retired military member, the plaintiff is entitled to participate in the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), as codified in chapter 55, Title 10, United States Code, Sections 1071 through 1089.

3. On October 15, 1976, the plaintiff underwent an operation to insert a small-carrion penile prosthesis at Doctor's Hospital of Lakewood, Lakewood, California. The operation was performed by Dr. Allen M. Shanberg, M.D.

4. Following this operation the plaintiff submitted a claim for reimbursement of his medical expenses to the Offices of CHAMPUS, which subsequently denied the claim on the basis that the procedure failed to qualify for benefits under the applicable law and regulations governing CHAMPUS.

5. The plaintiff appealed the initial decision on February 16, 1979. The Office of CHAMPUS (OCHAMPUS) Reconsideration Decision was issued on March 29, 1979, and upheld the denial of benefits on the basis that the surgery was not considered to be medically necessary; that the penile implant procedure did not constitute treatment of a medical or surgical condition; that the penile prosthesis was a specifically excluded prosthetic device; and, that under the Department of Defense Appropriations Act of 1977, therapy or counseling for sexual disfunctions or inadequacies was specifically excluded as a CHAMPUS program benefit.

6. The plaintiff, on April 12, 1979, requested a hearing on his appeal. A hearing was subsequently held before an independent hearing officer on July 3, 1980. The Hearing Officer recommended that the plaintiff's penile implant be approved as a CHAMPUS benefit.

7. On August 19, 1981, the Assistant Secretary of Defense (Health Affairs) issued the agency's Final Decision pursuant to the authority and requirements governing CHAMPUS appeals (32 C.F.R. 199.16). The Final Decision rejected the findings of the Hearing Officer,

holding that the penile implant was a prosthetic device specifically excluded from benefits under the statutes and regulations establishing the CHAMPUS program.

8. Subsequent to the issuance of the Final Decision, the plaintiff filed an administrative claim with the Department of Defense under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), 2671, *et seq.* On March 25, 1983, that claim was denied by the Department of Defense. On August 22, 1983, the plaintiff filed the instant action seeking damages under the FTCA.

9. To the extent that any Conclusion of Law is deemed a Finding of Fact, it is incorporated herein.

## CONCLUSIONS OF LAW

1. To the extent that any Finding of Fact is deemed a Conclusion of Law, it is incorporated herein.

2. Only the United States of America may be named as a defendant under the Federal Tort Claims Act ("FTCA"). Although the Secretary of Defense is the named defendant, plaintiff could readily amend the Complaint to substitute the United States as defendant. *See* Fed. R. Civ. P. 21.

3. This action is barred by the "discretionary function" exception to the waiver of sovereign immunity contained in the FTCA, 28 U.S.C. § 2680(a). This provision bars actions brought under the FTCA that challenge the constitutionality of legislation or the legality of a rule or regulation. *Myers & Myers v. United States Postal Service,* 527 F.2d 1252 (2d Cir. 1975); H. R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). Similarly, claims of arbitrary and capricious action, or abuse of discretion, may not be remedied through an FTCA action. *Myers & Myers, supra.* The gravamen of plaintiff's claim is that the Assistant

Secretary of Defense (Health Affairs) abused his discretion, or acted contrary to law, in denying plaintiff's claim for reimbursement of medical expenses. The Assistant Secretary's decision required interpretation of the statutes, *e.g.*, 10 U.S.C. § 1077(b)(2), and regulations governing the medical benefits available to retired military personnel. This sort of decision falls squarely within the scope of the "discretionary function" exception to the FTCA; consequently, plaintiff's action is barred.

Dated: April 3, 1984.

CYNTHIA HOLCOMB HALL
United States District Judge

# APPENDIX C

## § 1074. MEDICAL AND DENTAL CARE FOR MEMBERS AND CERTAIN FORMER MEMBERS

(a) Under joint regulations to be prescribed by the Secretary of Defense and the Secretary of Health and Human Services, a member of a uniformed service who is on active duty is entitled to medical and dental care in any facility of any uniformed service.

(b) Under joint regulations to be prescribed by the Secretary of Defense and the Secretary of Health and Human Services, a member or former member of a uniformed service who is entitled to retired or retainer pay, or equivalent pay may, upon request, be given medical and dental care in any facility of any uniformed service, subject to the availability of space and facilities and the capabilities of the medical and dental staff. The Secretary of Defense and the Secretary of Health and Human Services may, with the agreement of the Administrator of Veterans' Affairs, provide care to persons covered by this subsection in facilities operated by the Administrator and determined by him to be available for this purpose on a reimbursable basis at rates approved by the President.

(Added Pub.L. 85-861, § 1(25)(B), Sept. 2, 1958, 72 Stat. 1446, and amended Pub.L. 89-614, § 2(2), Sept. 30, 1966, 80 Stat. 862: Pub.L. 96-513, Title V, § 511(36), (37), Dec. 12, 1980, 94 Stat. 2923.)

## Historical and Revision Notes

| Revised section | Source (U.S. Code) | Source (Statutes at Large) |
|---|---|---|
| 1074(a) ..... | 37:421(a). | June 7, 1956, ch. 374, §§ 102(a)(3) (as applicable to § 301(b)), 301(a), (b), 70 Stat 250, 253. |
| 1074(b) ..... | 37:402(a)(3) (as applicable to 37:421(b)). 37:421(b). | |

### § 1074. Medical and dental care for members and certain former members

(a) Under joint regulations to be prescribed by the administering Secretaries, a member of a uniformed service who is on active duty is entitled to medical and dental care in any facility of any uniformed service.

(b) Under joint regulations to be prescribed by the administering Secretaries, a member or former member of a uniformed service who is entitled to retired or retainer pay, or equivalent pay may, upon request, be given medical and dental care in any facility of any uniformed service, subject to the availability of space and facilities and the capabilities of the medical and dental staff. The administering Secretaries may, with the agreement of the Administrator of Veterans' Affairs, provide care to persons covered by this subsection in facilities operated by the Administrator and determined by him to be available for this purpose on a reimburseable basis at rates approved by the President.

(c) Funds appropriated to a military department may be used to provide medical and dental care to persons entitled to such care by law or regulations, including the provision of such care (other than elective private treatment in private facilities for members of the armed forces.

(As amended Pub.L. 98-525, Title XIV, § 1401(e)(1), Oct. 19, 1984, 98 Stat. 2616; Pub.L. 98-557, § 19(3), Oct. 30, 1984, 98 Stat. 2869.)

# APPENDIX D

§ 1077. MEDICAL CARE FOR DEPENDENTS; AUTHORIZED CARE IN FACILITIES OF UNIFORMED SERVICES

(b) The following types of health care may not be provided under section 1076 of this title:

(1) Domiciliary or custodial care.

(2) Prosthetic devices, hearing aids, orthopedic footwear, and spectacles except that —

(A) outside the United States and at stations inside the United States where adequate civilian facilities are unavailable, such items may be sold to dependents at cost to the United States, and

(B) artificial limbs and artificial eyes may be provided.

(Added Pub.L. 85-861, § 1(25)(B), Sept, 2, 1958, 72 Stat. 1447, and amended Pub.L. 89-614, § 2(4), Sept. 30, 1966, 80 Stat. 863.)

# APPENDIX E

§ 1346. UNITED STATES AS DEFENDANT

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Island, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

# APPENDIX F

§ 2680. EXCEPTIONS

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On June 5, 1986, I served the within Petition for a Writ of Certiorari in re: "Harry H. Baie Jr. v. The Secretary of Defense of the United States of America" in the United States Supreme Court, October Term 1985, No.....;

on the Parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Stephen E. O'Neil, Esq.
United States Attorney's Office
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Edwin Meese, Attorney General
U.S. Department of Justice
Constitution Avenue & Tenth Street NW
Washington, D.C. 20530

All Parties required to be Served have been Served. I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 5, 1986, at Los Angeles, California

CE CE MEDINA